

PUBLIC PROSECUTOR

v.

AHMAD PUTEH & ORS.

HIGH COURT MALAYA, ALOR SETAR

LIM BENG CHOON J

[CRIMINAL APPEAL NO. 35 OF 1984]

2 JUNE 1986

CRIMINAL LAW AND PROCEDURE: *Dangerous drugs - Trafficking - Dangerous Drugs Act 1952 - Section 39B(2) - No prima facie case - Appeal by prosecution - Circumstances where appellate Court may disturb finding of trial Judge - Presumption under s. 37(d) of the Act - Whether custody and control established - Presumption under s. 37(g) - Whether drug concealed on premises - Meaning of "conceal".*

The 1st respondent was jointly charged in the Sessions Court with others for trafficking in dangerous drugs, thereby committing an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 ("the Act"). The drugs (cannabis) were found on the premises of the 1st respondent beneath newspapers in a bag which was zipped up but unlocked. At the close of the prosecution case, the 1st respondent was acquitted and discharged. The Public Prosecutor appealed against the acquittal.

Held:

[1] In interfering with the findings of a Subordinate Court, an appellate Court should give proper weight and consideration to such matters as:

- (i) the views of the trial Judge on the credibility of witnesses
- (ii) the presumption of innocence in favour of the accused
- (iii) the right of the accused to the benefit of any doubt
- (iv) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.

Further, where a question of fact has been tried by a Judge without a jury, and there is no question of the Judge misdirecting himself, an appellate Court should not come to a different conclusion on the printed evidence unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial Judge's conclusion.

[2] At the end of the prosecution case the question the trial Court has to decide is a question of law, but in arriving at a conclusion, the evidence must be examined.

[3] The trial Judge, in this case the learned President of the Sessions Court, had rightly held that the prosecution had failed to make out a *prima facie* case because they had failed to establish beyond reasonable doubt a necessary ingredient to invoke the presumption relied upon under s. 37(d) of the Act, namely custody and control. An element of knowledge is necessary for both custody and control. Where there is no physical possession of the drug, the inference of knowledge must be correctly construed from the evidence. In the instant case however, the bag was found in a section of the house not mainly or exclusively used by the 1st respondent, nor were any of his personal belongings found there; there were also discrepancies in the evidence as to the exact location of the bag and hence the proximity of the 1st respondent; further, the learned President was entitled to infer that there was too short an interval to assume custody and control. It would be unreasonable to say that mere sight of the bag fastened custody and control over it.

- a** [4] The drug was not concealed in the premises as there had to be a secret disposition of the drug in the premises. The prosecution could not therefore have relied upon the presumption under s. 37(g) of the Act. The drug was found not secreted in the house but in a bag left at the rear section of the house where it could be seen by anyone entering that section of the house; further anyone could have gained access or used that rear section. Alternatively, even if the prosecution could have relied on the presumption, the most that
- b** could be said was that there was knowledge of concealment which *per se* was insufficient to require the 1st respondent to answer a charge of trafficking unless there was sufficient evidence to show that he had custody and control.

- [5] Further, the learned President could and should have drawn an adverse inference against the prosecution for failing to call a material witness (although he was offered to the defence) pursuant to s. 114 illustration (g) of the Evidence Act 1950.
- c** [Appeal dismissed.]

Cases referred to:

- PP v. Goh Thor Kiah* [1952] MLJ 91
Lim Kheak Teong v. PP [1984] 1 CLJ (Rep) 207
Haw Tua Tau [1981] CLJ (Rep) 11
- d** *Ragunathan v. Pendakwa Raya* [1982] 1 MLJ 139
Leow Ngee Lim v. Regina [1956] MLJ 28
Neo Koon Cheo v. Regina [1959] MLJ 47
Phoon Lian Sum v. PP [1950] MLJ 205
Abdullah Zawawi v. Public Prosecutor [1985] CLJ (Rep) 19
Cozen v. Brutus [1973] AC 854
PP v. Lai Ah Bee [1974] 2 MLJ 74
- e**

Legislation referred to:

- Criminal Procedure Code, s. 314
 Dangerous Drugs Act 1952, ss. 37(b), (d), (g), (da), 39B(2)
 Evidence Act 1950, s. 114illus.(g)
- For the public prosecutor - Zulkifli bin Abu Bakar, DPP*
- f** *For the respondents - A. Nadarajan; M/s. Nadarajan & Co.*

JUDGMENT

Lim Beng Choon J:

- Originally 4 persons were charged jointly for trafficking in dangerous drugs to wit 3,524 rolls of cannabis weighing 2,234 grammes and thereby committing an offence punishable under
- g** s. 39B(2) of the Dangerous Drugs Act 1952. At the trial the charge against the 4th accused was withdrawn and he was accordingly acquitted and discharged by the learned President. At the close of the prosecution case, the learned President also acquitted and discharged the 2nd, 3rd and 4th accused. From this order of the learned President, the learned Deputy Public Prosecutor appealed to this Court. Before the hearing of this appeal, the learned DPP withdrew the appeal in respect of the 3rd accused. As the notice of appeal and the petition
- h** of appeal were not served on the 1st accused who is the 2nd respondent in this appeal, the learned DPP urged this Court to make an order to hear the appeal against the 2nd respondent in her absence pursuant to s. 314 of the Criminal Procedure Code.

- I am inclined to grant the Order requested by the learned DPP. However, on the authority of *PP v. Goh Thor Kiah* [1952] MLJ 91 which ruled that it would contravene the rule of natural justice to hear an appeal in the absence of the respondent, I therefore rejected the request made
- i** by the learned DPP and I proceeded to hear the appeal in respect of the 1st respondent only.

Briefly the evidence of the prosecution was that on 28 June 1982 at about 2.45 p.m. a party of police headed by one ASP Hadi (PW3) raided the premises of the 1st respondent and there they found a blue bag which was zipped up but without any lock. On opening the bag PW3 found some newspapers and underneath the newspapers there were 3,524 rolls wrapped up with pieces of paper. The police suspected that the 3,524 rolls contained cannabis and they were therefore sent to the chemist for examination and analysis. From the report of the chemist it was confirmed that the rolls contained 2,234 grammes of cannabis.

Before I proceed to consider the merits of this appeal it is essential that I should acquaint myself with the principle governing the scope of power of the appellate Court to interfere with the findings of a subordinate Court. I find guidance in the case of *Lim Kheak Teong v. Public Prosecutor* [1984] 1 CLJ (Rep) 207 where the Federal Court said:

With respect, what Lord Russell of Killowen said in *Sheo Swarup* was that although no limitations should be placed on the power of the appellate Court, in exercising the power conferred **“the High Court should and will always give proper weight and consideration to such matters.”** as-

- (1) the views of the trial Judge on the credibility of the witnesses;
- (2) the presumption of innocence in favour of the accused;
- (3) the right of the accused to the benefit of any doubt; and
- (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.

The Federal Court went on to say that:

Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion.

Needless to say I am bound to follow the principles as enunciated in that case in dealing with this appeal.

During the hearing of this appeal the learned DPP contended that the learned President had misdirected himself on the question of facts. He went into the appeal record of the trial in detail and submitted that the inferences drawn by the learned President were erroneous and also that he had arrived at a wrong conclusion in respect of the oral evidence given by the prosecution witnesses as well as the documents put in as evidence. Under the circumstances the learned DPP therefore contended that at the close of the prosecution case at the trial, the 1st respondent should have been called to enter upon his defence.

It is clear from the principle laid down by the Privy Council in *Haw Tua Tau* [1981] CLJ (Rep) 11 which was approved by the Federal Court in *Ragunathan v. Pendakwa Raya* [1982] 1 MLJ 139 that what the trial Court has to decide at the end of the prosecution case remains a question of law only. However, in arriving at the conclusion, the trial Court has to examine the evidence before it. If the evidence is inherently incredible or if the prosecution fails to prove one or more of the ingredients of the case the trial Court is justified in not calling upon the accused to enter his defence.

It is quite clear at the trial that the prosecution was relying on three presumptions under the Dangerous Drugs Act 1952. The first presumption was under s. 37(b) of the said Act which provides that a person is deemed to be an occupier of any premises if he has or appears to

a have care and management of such premises. It is commonplace between the parties that the 1st respondent being the owner had the care and management of the premises in question. Hence it could be said that he was the occupier within the scope of the presumption that is to say an occupier of the premises.

The next presumption relied by the prosecution was under s. 37(d) of the Dangerous Drugs Act 1952 which provides that

b Any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall until the contrary is proved be deemed to have been in possession of such drug and shall until the contrary is proved be deemed to have knowledge of the drug.

c It is clear from the authorities that in order to rely on this presumption the prosecution must prove beyond all reasonable doubt that in the instant case the 1st respondent was found to have had in his custody or under his control the blue bag containing the cannabis mentioned in the charge at the material time and place. It is also clear from the authorities that custody requires an element of knowledge on the part of the custodian. Likewise an element of knowledge is also necessary to establish control. In support of this proposition I need only to cite two authorities. Firstly in the case of *Leow Ngee Lim v. Regina* [1956] MLJ 28 Taylor J said at p. 29:

d There is no presumption **of** custody. The presumption is **from** custody. Unless custody was established, the chain of reasoning is broken. Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them not amounting to possession.

e The second case which adopted a similar approach is the case of *Neo Koon Cheo v. Regina* [1959] MLJ 47. There Ambrose J said at p. 49:

f A person cannot be said to have custody of a thing unless he knows it is in his custody. It is not necessary for the person to know the nature of the thing so long as he knows it is in his custody.

g It is obvious that if a person is in actual physical possession of a thing it would be fair and reasonable to infer that he has custody of and control over the thing which is in his possession. Where, however, an accused is not found in actual physical possession of a thing it is essential in order to establish custody and control that the inferences drawn from the evidence must be correctly construed and the conclusion inferred must be capable of only one construction and that is the guilty knowledge of the person (see *Phoon Lian Sum v. PP* [1950] MLJ 205). The learned President had examined in detail the evidence of the prosecution before he concluded that the said bag was not in the custody or under the control of the 1st respondent. It cannot be disputed that in the instant case the 1st respondent was not found in actual physical possession of the cannabis or the blue bag containing the cannabis.

h It seems to me that the learned President was satisfied that the cannabis or the said bag was not recovered from a room or a place used mainly if not exclusively by the 1st respondent since the learned President found as a fact that at the most the prosecution evidence could show was that the blue bag was recovered by the police at some place at the rear section of the house which comprised of a kitchen at the extreme end of that section and next to it a small hall which was described by PW4 and PW7 as the middle section.

i The difficulty faced by the President in trying to dissolve the question as to the place from where

the bag was recovered by the police was because of the discrepancies arising from the evidence of the prosecution witnesses in particular PW3, PW4 and PW7. PW3 said in his evidence that he found the bag at the corner in the kitchen hall. From the sketch plan at p. 32 of the appeal record the spot where the bag was supposed to be found was in the spot marked "Q" and PW4 said he found PW3 with the bag at the middle section of the house. Added to this confusing situation, the discrepancies of the witnesses also contributed to a certain extent to the inability on the part of the learned President to ascertain the physical proximity of the 1st respondent to the blue bag at the material time. In this respect it is to be noted that PW3 said in his evidence that as he entered the house he saw the 1st respondent in the kitchen while PW4 said on entering the house he could not even see the kitchen because of a wooden wall dividing the rear section of the house from the front section and that he could only see the 1st respondent when he was called by PW3 to come out to the front section of the house. Furthermore PW7 said in her evidence that she was with the 1st respondent who was sitting in the middle section of the house reading a newspaper when the police raided the place. These discrepancies brought about a break or gap in the chain of evidence of the prosecution and in the light of such gap the learned President therefore rightly held that the prosecution had failed to make out a *prima facie* case because they had failed to establish beyond a reasonable doubt an important ingredient which was necessary to invoke the presumption under s. 37(d) of the Dangerous Drugs Act 1952 namely custody and control. In this connection it may be noted that the police had not found any personal belongings of the 1st respondent anywhere at the rear section of the house. The absence of the police recovering any personal belongings of the 1st respondent supports the finding of the learned President that there was nothing to connect the 1st respondent with the bag. It is also impossible for the learned President to ascertain the element of close proximity in order to fasten custody or control on the 1st respondent. In view of this I am not prepared to disturb the finding of the learned President regarding the lack of evidence to fasten the 1st respondent with having custody or control of the said bag.

Furthermore the learned President had drawn an inference from the evidence of PW7 which further damaged the case for the prosecution. The evidence of this witness caused the learned President to question the ability of the 1st respondent to assume custody of or control over the blue bag considering that the interval between his returning home from work and the recovery of the blue bag by the police was about an hour. Within such a short interval could it be said that the 1st respondent could have assumed custody of or control over the blue bag and its contents particularly when PW7 said in her evidence that when she went to school in the morning of the day in question she did not see the blue bag and that her father left for work at 6.00 a.m. and did not return home till about 1.30 p.m. It might be reasonable to infer from her evidence that the 1st respondent could have had a fleeting glance or even seen the bag and the plastic basket when he entered the rear section of the house upon his return from work. But it is unreasonable to say that just because the 1st respondent had sight of the bag, which was not an unusual thing to be found in one's house, it must follow that he had custody of or control over it.

In considering this appeal, I have also taken note of the fact that the gap in the prosecution case could have been easily closed had they called a material witness in the person of detective police constable Rahmat to give evidence for the prosecution. This police officer was with PW3 all the time when PW3 was carrying out a search of the front and the rear sections of the house. Had he been called as a witness he could have easily dispelled the uncertainties in the prosecution evidence. The fact that he was offered to the accused as a witness for the defence could not be an excuse for the failure on the part of the prosecution

- a* to call him as their witness since there was a gap in the prosecution case. It is never the duty of the accused to supplement the prosecution case-see *Abdullah Zawawi v. Public Prosecutor* [1985] CLJ (Rep) 19. In failing to call such a material witness the learned President could and should have drawn an adverse inference against the prosecution pursuant to s. 114 illustration (g) of the Evidence Act 1950.
- b* The next presumption relied by the prosecution at the trial was s. 37(g). It is clear from the opening words of that section that the condition precedent to the application of the presumption is that a dangerous drug must be found to have been concealed in the premises. The learned DPP and the Counsel for the accused agreed with such proposition but the quarrel was whether on the facts of this case, there was concealment of the dangerous drug in the premises in question. I was at one stage somewhat disturbed over this issue as the finding of the learned President on this issue was rather confusing. I was inclined to think
- c* that he might have misconstrued the scope of s. 37(g). I therefore sought the assistance of the learned DPP and the Counsel to look for authorities which might help to clarify this issue. Hence I postponed the hearing to enable them to search for the relevant authorities. It is rather unfortunate that at the resumption of the hearing on 20 May 1986 neither the learned DPP nor Counsel for the accused could produce any authority. Be that as it may the clue to the proper construction of s. 37(g) lies with the crucial word “concealed”. As this
- d* word is not defined in the Dangerous Drugs Act 1952 and from the context of the said Section, the word is not used in any unusual sense, I am not inhibited from relying on the dictionary meaning to find a definition of that word - see the speech of Viscount Dilhorne in his judgment in *Cozen v. Brutus* [1973] AC 854 @ 865. The meaning of “conceal” as defined in the Shorter Oxford Dictionary is “to keep from the knowledge of observation of others” or “to put or keep out of sight or notice, to hide”. Applying the dictionary meaning of the word “conceal”
- e* as used in s. 37(g), it is clear in my mind that in order to raise the presumption provided by the Section the prosecution must introduce some evidence of a secret disposition of a dangerous drug in the premises. In the instant case the drug was found not secreted in the house of the 1st respondent but in a bag which was left somewhere at the rear section of the house which could be seen by anyone entering into that section of the house. Moreover,
- f* anyone could gain access or use the rear section of the house. On the facts of this case could it be said that the dangerous drug in question was found concealed in the house? My answer to this question is in the negative. Indeed PW3 in his evidence admitted that the bag could be seen and was not found hidden at all (“Bag itu boleh dilihat dan tidak tersorok”). The surrounding circumstances therefore went some way towards rebutting the presumption of knowledge of concealment as provided in s. 37(g).
- g* Accepting for the sake of arguments that my construction of the scope of s. 37(g) is wrong and that in the instant case the prosecution could rely on the presumption under s. 37(g), the most that could be said is that the 1st respondent had knowledge of the concealment. But knowledge of concealment *per se* on the facts of this case is not sufficient to require the accused to answer to a charge of trafficking unless the prosecution had adduced sufficient evidence to show that the 1st respondent had also in his custody and control the amount
- h* of the dangerous drug in question which was in excess of the amount stipulated in s. 37(da). The case of *PP v. Lai Ah Bee* [1974] 2 MLJ 74 @ 75 lends support to this proposition.

For the above reasons I dismiss the appeal.

Also found at [1987] 1 CLJ 488